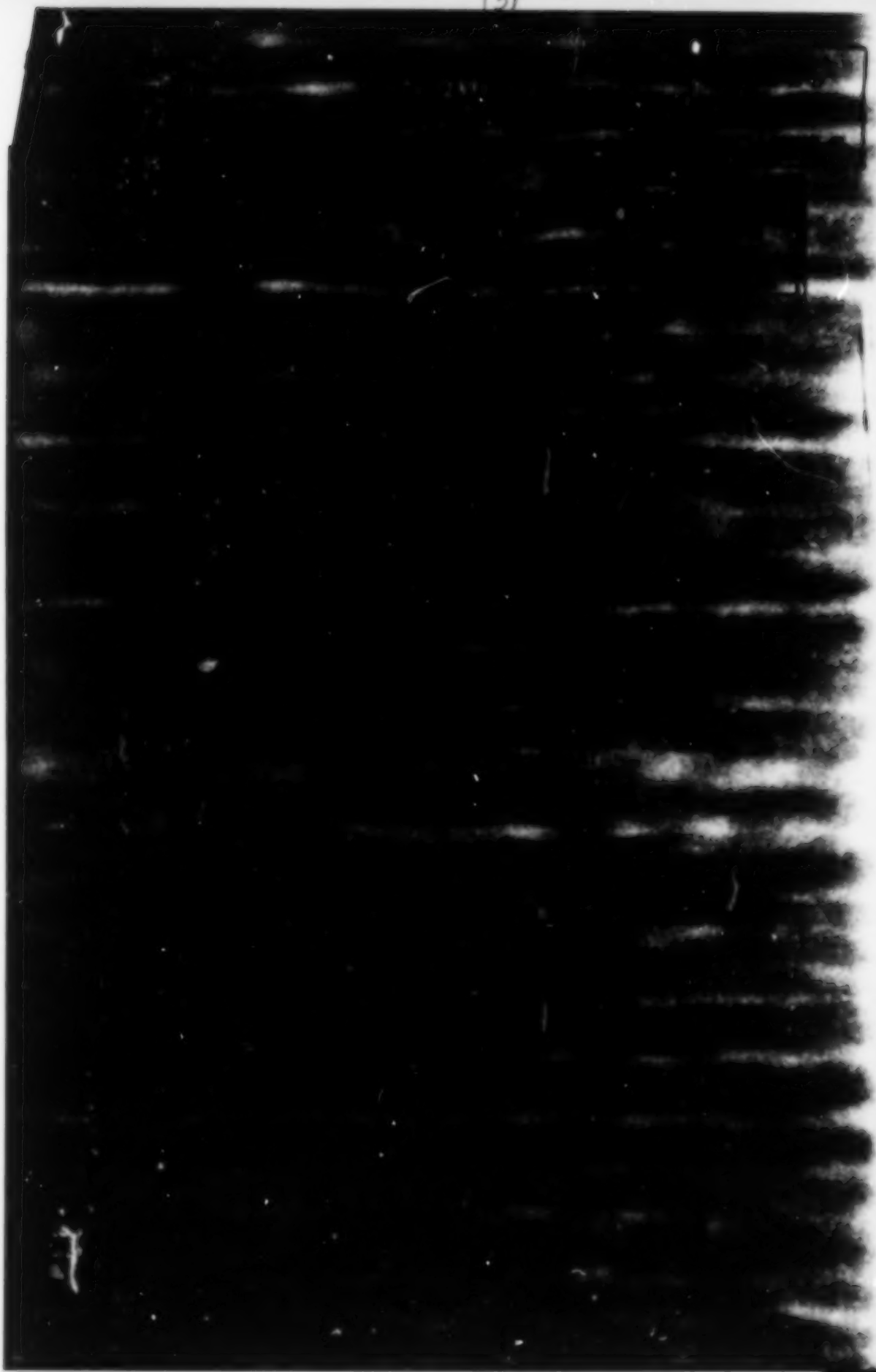


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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

FILE NO. 88-5223

JAMES OLDEN — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Commonwealth of Kentucky, prays that the petition for writ of certiorari to review the judgment of the Kentucky Court of Appeals decided on January 8, 1988, be denied.

OPINION BELOW

The Opinion of the Kentucky Court of Appeals is attached to the petition.

JURISDICTION

The jurisdiction of this Court is adequately set out in the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are adequately set out in the petition.

COUNTERSTATEMENT OF THE CASE

The petitioner was convicted of sodomy but was acquitted of kidnapping and raping Starla Matthews. His

co-defendant, Charles Harris, was acquitted of being a principal or accomplice to rape, sodomy and kidnapping. Olden's sentence was fixed at ten (10) years imprisonment.

The Commonwealth's first witness was Caroline Sivells, a nurse at the Caldwell County Hospital (Transcript of Evidence, hereinafter TE I, 72). She stated that Starla Matthews came into the emergency room with the police on December 16, 1985 (TE I, 73). She stated she had been raped (Id.). She had a laceration to the rectal-anal area (TE I, 75).

The next witness was Starla Matthews (TE I, 85). She stated she went to J.R.'s to use the restroom and the place became crowded with black people (TE I, 89). She went out and got in the front seat of a car between the petitioner and Ray Harris (TE I, 92). The petitioner pulled out a knife and told her he would kill her (TE I, 94). She got into the back seat and petitioner took off her pants and shoes (TE I, 95). The petitioner raped and sodomized her (TE I, 96).

William Russell testified that he saw the victim being pushed out of Ray Harris' car at his house (TE II, 186). She said she had been raped by petitioner and Ray Harris (TE II, 188).

Detective Mark Haberlock testified that he investigated the rape and sodomy of Starla Matthews and interviewed the petitioner and Harris (TE II, 203). The petitioner admitted he had had sexual intercourse (TE II, 205).

The first witness for the petitioner was Adrian Gray (TE III, 328). He testified he saw the victim at the Big O with petitioner on the front seat and Matthews on the back seat with Harris pumping gas (TE III, 329). A police officer was nearby (TE III, 330).

Emanual Tinsley testified he saw the petitioner, Harris, and Matthews together at J.R.'s (TE III, 334). The talk in the community about Ms. Matthews' reputation for truthfulness and veracity is not good (TE III, 336).

David Scott testified that he saw the three (3) together at J.R.'s on Christmas Day (TE III, 340).

The petitioner then testified that he and Matthews had sex in the back of J.R.'s (TE III, 343). Afterwards, they drove to the dump and had sex again (TE III, 347). He stated that the sexual acts were all done with her consent (TE III, 352).

REASON FOR DENYING WRIT

STATE INTERPRETATION AS TO SCOPE AND APPLICATION OF STATE LAW IS BINDING ON THE FEDERAL COURTS, IN PARTICULAR REGARDING THE RAPE SHIELD LAW

The Kentucky Court of Appeals found that because Matthews and Russell had some type of sexual relationship prior to the date of the offense, testimony relating to that relationship was not admissible under KRS 510.145(2). The Court of Appeals thus interpreted state law to mean that evidence of this relationship between Russell and Matthews was not admissible under state law. State interpretation as to the scope and application of state law is binding on the federal courts. Pilon v. Bordenkircher, 593 F.2d 264 (6th Cir. 1975); Buchalter v. New York, 319 U.S. 427, 87 L.Ed. 1492 (1943). The petitioner has failed to raise a federal constitutional error when the trial court's action was correct as a matter of state law. This Court should not second-guess the Kentucky Court of Appeals' interpretation of KRS 510.145(2), otherwise known as the Rape Shield Law.

It is clear as noted by the Court of Appeals that Matthews and Russell had in the past a sexual relationship. Although KRS 510.145(3) provides that the trial court may determine whether the probative value outweighs the inflammatory or prejudicial nature of the evidence, this only applies to evidence of the complaining witness' prior sexual conduct or habits with the defendant. Specific instances of the complaining witness' prior sexual conduct or habits with someone other than the defendant is never admissible. The trial judge has no discretion whether to allow it in. Therefore, the Kentucky Court of Appeals correctly held that the sexual relationship between Matthews and Russell was not admissible. KRS 510.145 contains no exemptions when the relationship is between the complaining witness and someone other than the defendant.

Of course, the extent of cross-examination with respect to any subject is always within the sound discretion of the trial court. Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931); United States v. Fife, 573 F.2d 369 (6th Cir. 1976). In the case at bar, the trial court properly exercised its discretion in excluding evidence of Russell's and Matthews' sexual relationship where it was prohibited from admitting the evidence by the Rape Shield Law. The trial court rightly used its discretion in limiting the scope and extent of questioning under state law. Barrett v. Commonwealth, Ky., 608 S.W.2d 374 (1980); United States v. Marchesani, 457 F.2d 1291 (6th Cir. 1972). No abuse of discretion is shown here where the trial court was obviously attempting to comply with Kentucky's Rape Shield Law. In fact, the trial court had no choice but to exclude evidence of the relationship.

The Kentucky Court of Appeals found that the Rape Shield Law mandated that evidence of Russell's and Matthews' sexual relationship be excluded. The petitioner has failed to raise a federal constitutional issue where the matter involves a state court's interpretation of the scope and application of a state law.

CONCLUSION

Kentucky's Court of Appeals construed the Rape Shield Law to mean that the relationship between Russell and Matthews must be excluded. The trial court did not improperly limit the scope of cross-examination with respect to this relationship because the matter could not be introduced under the Rape Shield Law. Since an interpretation by state courts of state laws is binding on the federal courts, the petitioner has failed to raise a federal constitutional issue. The petition for writ of certiorari must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph R. Johnson, Assistant Attorney General, Counsel for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9 day of September, 1988, I served the petitioner with Brief for Respondent in Opposition by placing three copies of the same in the United States Postal Service mail, first class postage prepaid, and addressed to Hon. Larry H. Marshall and Hon. Randall L. Wheeler, Assistant Public Advocates, 1264 Louisville Road, Perimeter Park West, Frankfort, Kentucky 40601, Counsels for Petitioner.

Joseph R. Johnson
Assistant Attorney General

rape. Any sexual intercourse with a person less than 12 years old constitutes first degree rape regardless of the age of the accused.

CROSS REFERENCES

See Brickey, Kentucky Criminal Law § 11.10(2), 11.15, 11.22

Furnishing person's record of sex crimes convictions to potential employer, 17.160
Persons prohibited from probation, parole or conditional discharge, 532.045

550 SW(2d) 478 (Ky 1977), Cooper v Com. This section of the statute is concerned with sexual offenses not specifically covered by other sections of KRS Ch 510.

510.145 Inadmissibility of evidence of prior sexual conduct or habits of complaining witness; exception; procedure for admission

(1) As used in this section, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to the provisions of this section.

(2) In any prosecution under KRS 510.040 through 510.140, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of these sections, reputation evidence, and evidence of specific instances of the complaining witness' prior sexual conduct or habits is not admissible by the defendant.

(3) Notwithstanding the prohibition contained in subsection (2) of this section, evidence of the complaining witness' prior sexual conduct or habits with the defendant or evidence directly pertaining to the act on which the prosecution is based, may be admitted at the trial if the relevancy of such evidence is determined in the following manner:

(a) A written motion shall be filed by the defendant with the court no later than two (2) days prior to the day of trial, or at such later time as the court may for good cause permit, stating that the defendant has an offer of relevant evidence of prior sexual conduct or habits of the complaining witness.

(b) A hearing on the motion shall be held in the judge's chambers. If, following the hearing, the court determines that the offered proof is relevant and that it is material to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature, the court shall admit the offered proof, in whole or in part, in accordance with the applicable rules of evidence.

HISTORY: 1976 H 143, § 1, 2, eff. 6-19-76

CROSS REFERENCES

See Brickey, Kentucky Criminal Law § 11.04
See Milward, Kentucky Criminal Practice, 2d ed., Text 39.18, 43.04, 45.15

Evidence affecting credibility of prosecutrix. 65 Am Jur 2d, Rape § 86, 87
Corroborative evidence of rape victim. 65 Am Jur 2d, Rape § 94
Rape: constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences. 1 ALR4th 283

CONSTITUTIONALITY:

566 SW(2d) 181 (Ky App 1978), Smith v Com. See as to the constitutionality of KRS 510.145, the Rape Shield Law.

66 Ky L J 426 (1977). The Kentucky Rape Shield Law: One Step Too Far, Jennifer Burcham Coffman.

4 Nor Ky L Rev 345 (1977). Relevancy of Evidence of Prior Sexual Conduct Under the Kentucky Revised Statute Section 510.145, Randall S. May and P. Dane Shields.

510.150 Indecent exposure

(1) A person is guilty of indecent exposure when he intentionally exposes his genitals under circumstances in which he knows or should know his conduct is likely to cause affront or alarm.

(2) Indecent exposure is a Class B misdemeanor.

HISTORY: 1974 H 232, § 95, eff. 1-1-75

COMMENTARY (1974)

KRS 510.150 prohibits any exposure of the genitalia done with intent to arouse or gratify the actor's sexual desire or that of another to whom he is not married under circumstances in which he knows his act will probably cause affront or alarm. Thus, three elements must be shown: an exposure of the genitalia; intent to arouse or gratify the sexual desire of the actor or of another person to whom he is not married (an inadvertent or accidental exposure is excluded); and knowledge that under the circumstances his conduct is likely to cause affront or alarm.

Under KRS 510.150, it is not the place but the purpose of the exposure and the likelihood of affront or alarm to others that determines the actor's criminality. The offense can be committed in any place where the conduct may reasonably be expected to be viewed by others. It is the probability of public view that is critical rather than the ownership or use of the particular real estate on which the act occurs. For example, a person standing nude before a window in his private apartment which is adjacent to a well-traveled sidewalk would fall within the purview of KRS 510.150. On the other hand, a couple in a parked car on a lonely, country road would probably be excluded.

Exhibitionism is an emotional illness resulting in compulsive behavior. It is questionable whether penal sanctions are effective in controlling this illness. The offense is penalized in this chapter because the resulting social harm is sufficiently serious to warrant penal sanctions.

Under former Kentucky law indecent exposure was treated as a common law offense or prosecuted under a municipal ordinance. KRS 510.150 merely codifies this prohibition. KRS 510.150 would also replace 436.140 which prohibited a person from appearing on a highway or upon a city street that has no police protection when clothed in ordinary bathing garb.

CROSS REFERENCES

See Brickey, Kentucky Criminal Law § 11.21

Furnishing person's record of sex crimes convictions to potential employer, 17.160
Persons prohibited from probation, parole or conditional discharge, 532.045

Improper libertine. 6 Am Jur 2d, Assault and Battery § 27
Lewdness, indecency, and obscenity; statutory crimes. 50 Am Jur 2d, Lewdness, Indecency, and Obscenity § 18

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